

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-190988**DATE: April 17, 1978****MATTER OF: Rempac Foam Corporation****DIGEST:**

1. Since offeror knew or should have known basis of protest after receipt of letter from procuring activity rejecting its proposal as technically unacceptable, but did not protest within 10 working days after receipt, protest concerning rejection of proposal is untimely and not for consideration on merits.
2. Protest to GAO of end item testing procedures contained in RFP, filed after closing date for receipt of initial proposals, is untimely under GAO Bid Protest Procedures since alleged impropriety was apparent prior to closing date for receipt of initial proposals and will not be considered on merits.

On July 7, 1977, the Defense Personnel Support Center, Defense Logistics Agency (DLA), Philadelphia, Pennsylvania, issued request for proposals (RFP) No. DSA100-77-R-0902 for the procurement of synthetic rubber berth mattresses for Navy shipboard use. The closing date for receipt of initial proposals was August 4, 1977.

The detailed specifications contained in the RFP required that the mattresses be manufactured using polychloroprene cellular rubber compound, commonly known as neoprene, as the base material. The RFP also required fire resistance testing of the end item as prescribed in American Society for Testing and Materials (ASTM) E162-67, entitled "Surface Flammability of Materials Using a Radiant Heat Energy Source", in effect on the date of the RFP.

Rempac Foam Corporation (Rempac) submitted a proposal with the following deviation from the stated requirements:

"This bid is based on substituting a modified polyurethane foam in place of the synthetic rubber as is described in MIL-M-18351E. The proposed material will meet and/or exceed all standards described in the specification."

After technical review of Rempac's proposal by the Naval Ship Engineering Center (NAVSEC), DLA was advised that mattresses manufactured from polyurethane foam would not meet the needs of the Navy relative to fire safety. Consequently, in a letter dated November 25, 1977, the contracting officer notified Rempac as follows:

"Reference is made to Request for Proposal DSA100-77-R-0902. You are advised that your request to use a modified polyurethane foam in lieu of specification material is denied. This material is unacceptable for Navy ship-board use. I would like to thank you for interest in the program and appreciate the effort you have put into it."

This letter reached Rempac on or before December 5, 1977. By telegram dated December 27, 1977, which was received at this Office on the following day, Rempac protested the agency's rejection of its proposal and also protested the fire resistance testing procedures prescribed in the RFP, contending that such testing procedures were discredited by a U.S. Department of Commerce report issued in March 1977.

We believe the protest to be untimely. With regard to rejection of its proposal, Rempac knew or should have known of the basis of its protest after receipt of the November 25, 1977, letter of the contracting officer rejecting its proposal as technically unacceptable. Rempac did not file its protest within 10 working days after receipt of this rejection letter. In this regard, GAO's Bid Protest Procedures, 4 C.F.R. § 20.2 (b)(2) (1977), require that protests be "filed" not later than 10 working days after the basis of the protest is known or should have been known, whichever is earlier. The term "filed" means receipt by the contracting agency or this Office, whichever the case may be. 4 C.F.R. § 20.2(b)(3) (1977). Rempac argues, however, that in December 1977, after it had received the November 25, 1977 letter from the contracting officer, NAVSEC, the "user" agency, continued to consider its proposal to substitute polyurethane

foam and requested additional fire safety test data concerning the product. We do not believe that this argument forms a basis for consideration of Rempac's protest on the merits. The contracting officer's initial determination, in his November 25, 1977 letter, rejecting Rempac's proposal as technically unacceptable, clearly constituted notification of adverse agency action from which a protest is required to be filed within the time limits stated above. Our rules impose strict time limits and are strictly construed. We have held, even in the absence of prejudice to the agency, that a protest is untimely when it is filed prior to award but more than 10 working days after the offeror is informed of the rejection of its proposal as technically unacceptable. Power Conversion, Inc., B-186719, September 20, 1976, 76-2 CPD 256. Accordingly, Rempac's contention concerning the rejection of its proposal will not be considered on the merits.

Additionally, Rempac's contention, made after the closing date for receipt of initial proposals, regarding the testing procedures for end items contained in the RFP, is likewise untimely under our Bid Protest Procedures since the alleged impropriety was apparent prior to the closing date for receipt of initial proposals. 4 C.F.R. § 20.2(b)(1) (1977). Therefore, this issue will also not be considered on the merits.

In view of the above, the protest is dismissed.


Paul G. Dembling
General Counsel